Supreme Court, U. S.
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No. 77-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

RAY MARSHALL, SECRETARY OF LABOR, PETITIONER

v.

DANIEL CONSTRUCTION COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR DANIEL CONSTRUCTION COMPANY IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-40a) is reported at 563 F.2d 707. The opinion of the district court (Pet. 45a-48a) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1977, and petitions for rehearing and rehearing *en banc* were denied on December 30, 1977 (Pet. 41a-44a). The petition for a writ of certiorari was filed on May 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Labor exceeded his authority in promulgating a regulation pursuant to the provisions of the Occupational Safety and Health Act of 1970, which grants to employees a new right to refuse to perform assigned tasks, without resort to the expressly established statutory procedure, based on the employee's own subjective determination that he or she would be exposed to a dangerous condition.

STATUTE INVOLVED

The relevant provision of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U.S.C. 651 et. seq.) provides, in pertinent part (29 U.S.C. 660 (c)(1)):

> (c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

STATEMENT

This action was initiated by the Secretary of Labor under Section 11(c)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 660(c)(1); hereinafter "the Act"), and regulations promulgated thereunder. This section prohibits an employer from discharging or in any manner discriminating against any employee "because of the exercise by such employee . . . of any right afforded by this Act." The Secretary alleged that respondent unlawfully discharged one of its employees for refusing to perform a particular assignment believed by the employee to present a dangerous situation, and that said discharge was in retaliation for the exercise by the employee of a right "afforded by this Act."

In support of his allegation, the Secretary relied on regulations promulgated by him interpreting Section 11 (c)(1) of the Act. In pertinent part the regulation, published at 29 C.F.R. 1977.12 (Pet. 49a-58a) provides:

> (b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. . .
>
> (2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The conditions causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury, and that there is insufficient time due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain a correction of the dangerous condition.

Considering the foregoing, the district court dismissed the complaint, reaching the "inescapable" conclusion that "no claim for relief has been stated here." (Pet. 48a). The court noted that the statute provided an express method for dealing with threat of imminent danger and that the complaint failed to allege whether the employee in this case followed that procedure. The court concluded that "Congress faced the situation such as presented in this suit and it supplied a specific remedy, however inadequate it might be viewed by some." (Pet. 48a).The court thus declined "to expand or rewrite legislation passed by Congress." (Id.).

A divided court of appeals affirmed the decision of the district court, noting that "our examination of the statutory scheme and the legislative history of the Act compels the conclusion that . . . the regulation is invalid because it is beyond the Secretary's grant of authority under the enabling provision." (Pet. 7a). In applying what even the dissenting opinion called "a properly deferential standard for our review of the Secretary's interpretation of the Act" (Id. 27a), the majority concluded that Congress established an express statutory procedure to deal with the situation here presented in lieu of the implied "right" granted by the Secretary in his regulation.

In reaching this conclusion, the court made two specific findings. First, it noted that the Act grants numerous rights to employees so that they may "play an integral role in achieving the salutary purpose of assuring safe and healthful working conditions, in relation to preventing imminent dangers." (Id. 10a). However, in detailing these rights the court correctly observed that "[a]t no point does the Act permit workers to make a determination that a dangerous condition exists *in fact* and that their employment or their employer's business operations may be halted by their refusal to work." (Id. 11a). Secondly, the court reviewed the legislative history of the Act and determined that Congress specifically considered, and ultimately rejected, provisions which would have given to

employees a right equivalent to that provided for in the Secretary's regulation. (Id. 12a-18a). One of the provisions considered by Congress would have entitled employees to absent themselves from the job with pay when exposed to conditions believed to be dangerous to health (Id. 13a), while another would have permitted a federal inspector to issue an administrative order restraining an employer's business operations for up to 72 hours if the inspector believed an imminent danger existed. (Id. 16a-17a).

After noting the reasons stated by Congress for rejecting these provisions, the court concluded that "[i]n lieu of providing workers with the right to 'strike with pay,' . . . [and] granting workers this right to request inspections Congress adopted a procedure that permitted workers to participate in the enforcement efforts under the Act." (Id. 19a). Moreover, the court determined that the Secretary's regulation "expressly confers upon employees a right that Congress deliberately chose not to grant to OSHA inspectors: the right to determine *in fact* that an employment practice or condition presents" a dangerous situation for which normal statutory procedures will not suffice. (Id. 20a). In addition, the court found that by permitting employees to refuse to work upon making such a determination, the regulation grants to employees an additional "right which Congress . . . deliberately withheld from OSHA inspectors," that being the power to enjoin all or part of an employer's business which Congress placed exclusively in the courts (Id.).

In his dissenting opinion, Judge Wisdom notes that the regulation in question "can be interpreted as embodying one of the 'other rights' mentioned in 11(c)(1),[1] a right to safe conditions implicit in the entire law." (Id. 29a). He felt that the

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[1] The Judge's use of quotation marks around the phrase "other rights" is puzzling, since that phrase does not appear at all in Section 11(c)(1). The Section protects employees in the "exercise by such employee on behalf of himself or others of any right afforded by this Act."

regulation filled a gap between the time necessary to implement the Act's specific provisions for dealing with imminent dangers and the immediacy of the situation with which an employee is confronted. (Id. 28a). Although the regulation itself is silent on the subject, the Judge concluded that ". . . apparently, the worker is neither entitled to receive pay while not working, nor privileged to refuse alternative, safe work." (Id. 29a). Thus he found the protection "limited." (Id.)

Finally, the Judge disagreed with the majority's interpretation of the legislative history, concluding that the provisions rejected by Congress were not equivalent to the right granted by the Secretary's regulation. Moreover, he determined that Congress' refusal to give certain powers to federal inspectors did not imply that such rights were to be denied to employees (Id. 32a-36a).

REASONS FOR DENYING THE PETITION

1. The decision of the court of appeals that the regulation in question is clearly inconsistent with the express language of the statute, and with congressional intent as manifested in the legislative history, is correct and warrants no further review. Indeed, in so holding the court merely gives recognition to the established principle that where an inconsistency between the regulation and the statute is so patent, a court has no choice but to hold that the administrator has exceeded his authority and employed means not appropriate to the end specified in the Act. See, e.g. *Gardner v. United States* 239 F.2d 234 (5th Cir. 1976); see, also, *Commissioner of Internal Revenue v. South Texas Lumber Company,* 333 U.S. 496 (1941).

The existence of such an inconsistency in the situation here presented is amply supported. The Secretary's own interpretation of the protections afforded by Section 11(c)(1) begins with the revealing statement that ". . . review of the Act and examination of the legislative history discloses that, as a

general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." 29 C.F.R. 1977.12(b)(1). The court, after conducting an exhaustive review of the Act's specific provisions and the legislative history, agreed with this interpretation and simply refused to permit the Secretary to accomplish administratively what Congress expressly denied him legislatively.

In reaching this conclusion the court relied primarily on two events which are clearly dispositive of the issue. First, the House substituted a bill which did not contain a "strike with pay" provision for one which would have permitted employees to absent themselves with pay when exposed to a dangerous health hazard. The House then acceded to the Senate passed bill which, as its principal sponsor noted, contained an express employee right to request expedited inspections in lieu of a "strike with pay" provision. (Pet. App. 12a-15a). As the court noted, ". . . .the wholesale rejection of the provision demonstrates that an overriding concern of Congress was its fear that workers might abuse the rights granted and disrupt or terminate their employer's business operations as a form of intimidation or harassment." (Pet. App. 18a-19a).

Second, the court detailed the ultimate rejection of a provision which would have permitted a federal inspector to shut down all or part of an employer's business that he or she believed to present an imminent danger. Instead, "Congress gave the federal courts the sole authority to enjoin. . . an employer's business and then only to the extent necessary to eradicate the imminent danger." (Id.). The court thus concluded that Congress did not intend to grant to employees a right specifically denied to those responsible for the enforcement of the Act. Rather, the court determined that Congress established an express statutory procedure "that would prevent the potential for abuse from the worker's indiscriminate exercise of his right and avoid unnecessary confrontations . . .which might cause a disruption of the employer's business operations." (Id. 19a).

That the Secretary's regulation provides the basis for potential abuse circumscribed by Congress or, at best, grounds for endless litigation, is obvious. It permits an employee to subjectively determine that a dangerous situation exists, and to walk off the job until the employee determines that the hazard has been abated, without even requiring the employee to resort to the statutory procedures available. An employer is thus faced with making the determination of whether the employee's refusal is in "good faith," whether his fears are "reasonable" and ultimately must either allow his operation to be suspended or face litigation. Surely, after examining the situation and determining that the employee's fears are groundless, an employer's decision to continue the work must be accorded "good faith." To hold otherwise would give credence to the suggestion that most employers operate in callous disregard for the health and safety of their employees. Congress itself refused to make this assumption noting that if employees informed their employers of an apparent hazardous condition then "99 times out of 100" the employer would correct it.[2] Where a "good faith" disagreement exists, then resort to the express statutory provisions is available, and is clearly protected activity. However, where Congress has given employers the benefit of the doubt, the courts must do likewise.

2. Nor is there any merit to petitioner's contention that the right granted in the regulation may be implied from the Act's overall purposes. Indeed, Congress' failure to include such a right in the Act becomes even more significant when contrasted with the express provisions for other varied, and numerous employee rights. These include *inter alia* the right to accompany inspectors during inspection (29 U.S.C. 657(e)); the right to file complaints or notify the Secretary of an alleged violation (29 U.S.C. 657(f)(1)(2)); the right to participate as a party at hearings and to challenge abatement periods (29 U.S.C.

[2] See 116 Cong. Rec. 38, 367-386; 116 Cong. Rec. 37, 327-346 (1970).

659(c)); the right to appeal adverse decisions (29 U.S.C. 660(a)); and the right to challenge OSHA standards (29 U.S.C. 655(f)).

The maxim of statutory construction *expressio unis est exclusio alterius* seems particularly applicable here. Congress was fully aware of employee rights when it drafted the Act, was capable of providing for a right identical to that contained in the regulation, but did not do so. In similar statutes where Congress wished to provide for such rights, it can and has done so.

For example, Section 502 of the Labor Management Relations Act, 29 U.S.C. 143, provides that "the quitting of labor by an employee . . . in good faith because of abnormally dangerous conditions for work at the place of employment . . . [shall not] be deemed a strike under this chapter." Clearly, Congress could have employed similar language to make the discharge of an employee a discriminatory act.

Similarly, in the recently enacted Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., Congress expressly granted to the Secretary the right to order a shut down of a mine administratively, and to order the withdrawal of employees from the mine with pay, a right expressly denied under the Act. The power to order such withdrawal with pay is not limited to imminently dangerous situations, but includes non-abatement of hazardous condition, "unwarrantable failures" to comply with standards, and even violation of a miner's training requirements. 30 U.S.C. 814(b)-(h), 817. The amount of pay a miner is to receive when a withdrawal order is issued is also specified. 30 U.S.C. 814(g)(2), 821.

Thus, the court below, after due consideration of the Act, its legislative history, and the policy issues raised was correct in holding that the regulation promulgated by petitioner would effectively amend the Act by providing that which Congress did not, and that petitioner's arguments could not suffice as a basis for amendment of the Act by the judiciary.

3. Nor is there merit to petitioner's contention, accepted in the dissenting opinion (Pet. App. 32a-33a), that Congressional concern over the "strike with pay" provision is irrelevant to the regulation here in issue. Indeed, the position urged by the petitioner and the dissenting judge that an employee must be prepared to forego pay if necessary to escape the hazard, is completely contradictory to the interpretation of Section 11(c)(1) adopted by the petitioner. Clearly, if the employee has a "right" to refuse to work in the presence of a hazardous condition, then the denial of pay to an employee who exercises that right would certainly be considered to have a "chilling effect" on that right, and be considered discriminatory "in any manner" under Section 11(c)(1).

In support of the above, it must be noted that the Secretary has recently issued an interpretive rule amending a regulation, which states that any failure by employers to pay employees for time spent accompanying an OSHA inspector during an inspection, would be discrimination under Section 11(c) of the Act. (42 Fed. Reg. 47344, amending 29 C.F.R. 1977.21.)[3] This new interpretation is a complete reversal of the previous position taken by the Secretary, which held that such time was not compensable because the activity was not normal work activity. (See, 38 Fed. Reg. 2681, Jan. 29, 1973).

If the Secretary now feels that the denial of pay to employees who exercise their "walkaround" right is discriminatory, then he cannot seriously assert that there is a distinction between that right and the right to refuse to work under conditions established by the regulation. Thus, the Secretary does, indeed, set up the potential for a "strike with pay" which Congress rejected.

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[3] This interpretation has been challenged in a suit now pending before the United States District Court for the District of Columbia. *Chamber of Commerce of the United States v. O.S.H.A.*, Civ. Action No. 77-1842.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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